APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-2610

[Filed June 25, 2009]

Ross Parkhurst, individually and as guardian and next friend of H. P.; Amy Parkhurst, individually and as guardian and next friend of H. P.; H. P., a minor child under the age of eighteen,	)
Plaintiffs - Appellants,	)
v.	)
Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; Daniel Shue, individually and in his official capacity as Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; County of Sebastian, a body corporate and politic in the State of Arkansas,	)

Defendants - Appellees.)
)

Appeal from the United States
District Court for the
Western District of Arkansas.

Submitted: May 13, 2009
Filed: June 25, 2009

Before WOLLMAN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Ross and Amy Parkhurst, the adoptive father and biological mother of H.P., a minor child, asserted claims as next friend under 42 U.S.C. § 1983 against Arkansas state prosecutors Stephen Tabor and Daniel Shue, and Sebastian County, Arkansas. The Parkhursts alleged a violation of H.P.'s right to equal protection under the Fourteenth Amendment based on Tabor and Shue's decision to issue a nolle prosequi[1] and forego prosecution of H.P.'s biological father for the felony sexual assault of his daughter. The district court[2]

[1] A legal notice that a lawsuit has been abandoned. Black's Law Dictionary 1070 (7th ed. 1999).

[2] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

dismissed the case under Rule 12(b)(6) for failure to state a claim. The Parkhursts appeal, arguing that the Fourteenth Amendment guarantees to crime victims the nondiscriminatory prosecution of crime. We affirm.

I.

When a district court dismisses a claim under Rule 12(b)(6) we examine the facts alleged in the complaint. See Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996). Amy Parkhurst and Chad Belt married in Arkansas in 1993, and their daughter H.P. was born in 1994. When the couple divorced in 2000, Amy Parkhurst was awarded sole custody while Belt was granted visitation rights. Shortly thereafter Amy Parkhurst relocated to Arizona with H.P. and married Ross Parkhurst.

H.P. first visited Belt in Arkansas for an extended period of time during the summer of 2001 when she was seven. After returning to Arizona H.P. begged her mother not to require her to visit her biological father again. When Belt arrived in Arizona the following summer to take H.P. back to Arkansas, she became emotionally overwrought and was allowed to skip the visit. Belt insisted that H.P. resume visitation in 2003, however, and H.P. spent seven weeks in Arkansas with him when she was nine. Amy Parkhurst spoke regularly to H.P. that summer and reported that her daughter seemed increasingly uncomfortable and emotional as the summer progressed.

On July 21, 2003 H.P. telephoned her mother from Arkansas and informed her that she had injured her genitals in a diving board accident and was bleeding vaginally. Two days later Amy Parkhurst traveled to Arkansas to investigate the nature of H.P.'s injuries and to procure medical treatment for her daughter since Belt had not. Upon Amy Parkhurst's arrival, H.P. informed her that she had injured both her "bottom" and her vagina. Between July 23 and 28 H.P. was examined at three separate medical facilities in Arkansas and Oklahoma. Although H.P. continued to insist that she had been injured in an inconsistently described accident, all medical personnel diagnosed H.P. as a potential victim of sexual abuse. The matter was referred to the Crimes Against Children Division of the Arkansas State Police which determined that H.P. had been sexually abused but noted that she feared identifying the perpetrator.

Shortly after H.P. and her mother left Arkansas for Washington state, where the Parkhursts had relocated, Belt spontaneously offered to relinquish his parental rights to H.P. if the Parkhursts would sign a statement that they were not accusing him of molesting the girl. The Parkhursts executed the requested document and Belt consented to the termination of his parental rights. Thereafter Ross Parkhurst began proceedings to adopt H.P., and H.P. sought and received assurance that she would not have to visit Belt in the future. Several days after the adoption ceremony, H.P. disclosed that Belt had raped her during the summers of 2001 and 2003. Belt was arrested by the Sebastian

County, Arkansas police and charged with felony sexual assault on December 5, 2003.

Chief Deputy Prosecuting Attorney Tabor and Prosecuting Attorney Shue were assigned to the case. The prosecutors expressed confidence in the overwhelming evidence against Belt. Shue stated, however, that as a matter of policy his office was reluctant to prosecute sexual abuse perpetrated by a close relative. As he put it, "no one wants these [incest] cases" and his office "would prefer not to prosecute such a case if it could find a reason not to." In their appellate brief Tabor and Shue suggested that victims of incest make "hesitant" and "incredible" witnesses and that the department prioritizes "other types of cases" as a result. Shue acknowledged that in this respect the departments' approach to incestuous assault differs from its approach to other sexual assault cases.

The Parkhursts claim that as a result of this policy Tabor and Shue sought a pretext for abandoning the Belt prosecution. Under Arkansas law the result of a polygraph test is inadmissible in a criminal proceeding unless the parties stipulate to its admissibility. The Parkhursts allege that Tabor and Shue were aware that an agreement to administer a polygraph examination and to stipulate that the result would be admissible was contrary to sound prosecutorial policy because the perpetrator of a sex crime is often able to pass a polygraph test. Despite their alleged knowledge that it would be inadvisable, Tabor and Shue arranged for the administration of a polygraph exam to Belt and stipulated that the results would

be admissible in court. On March 4, 2004 Belt took a polygraph test. The examiner posed only three relevant questions: (1) "Did you ever have sexual contact with [H.P.'s] private area?" (2) "Have you ever had sex with [H.P]?" and (3) "Is [H.P.] telling the truth about you having sex with her?" Belt was not asked about H.P.'s alleged diving board injury or the circumstances surrounding his offer to terminate parental rights. The polygraph examiner informed Tabor on March 16 that Belt "ha[d] been truthful in answering the . . . questions."

Several months later Tabor and Shue informed the Parkhursts by letter that they intended to issue a nolle prosequi as a result of the polygraph examination:

> [We are] convinced that the event occurred and, under normal conditions, would have no compunction whatsoever in proceeding to trial in this matter. However, . . . [i]n this case, because of the stipulated polygraph examination results, it is [our] belief that a grand jury would not convict the Defendant, Chad Belt . . . .

That same day Tabor and Shue issued the nolle prosequi and suspended the Belt prosecution.

On June 6, 2007 the Parkhursts brought a § 1983 action on H.P.'s behalf against Tabor and Shue, in both their official and individual capacities, and against Sebastian County, Arkansas, alleging a violation of H.P.'s right to

equal protection.[3] The Parkhursts asserted that H.P. was discriminated against as a member of a disfavored class they defined as victims of incestuous sexual abuse. They sought damages, an injunction requiring the reinstatement of the charges against Belt, and a declaratory judgment that the challenged prosecutorial policy violated the equal protection clause by failing to provide to victims of incest the same protection offered to other victims of sexual assault.

Tabor, Shue, and the county moved to dismiss for failure to state a claim, arguing that as victims the Parkhursts lacked standing to subject state prosecutorial decisions to constitutional scrutiny. The district court granted the motion, explaining that prosecutorial conduct may only be subjected to such review by those with a constitutional right to the nondiscriminatory prosecution of crime. That right, according to the district court, rests with defendants subjected to discriminatory prosecution but does not accrue to the victims of crime. The Parkhursts appeal, arguing that the district court erred in dismissing their suit because the Fourteenth Amendment guarantees to crime victims the nondiscriminatory prosecution of crime.

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[3] The complaint also included state claims against Belt for battery and outrage. Those claims were tried before a jury which found Belt liable for sexually abusing H.P. and awarded the Parkhursts $250,000 in compensatory damages and $750,000 in punitive damages. We recently affirmed that judgment on appeal. See Parkhurst v. Belt, No. 08-2668, 2009 WL 1586981 (8th Cir. June 9, 2009).

II.

We review de novo a district court's grant of a 12(b)(6) motion to dismiss. Botz v. Omni Air Int'l, 286 F.3d 488, 491 (8th Cir. 2002). In doing so we must accept as true the plaintiff's well pleaded allegations. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). To survive a motion to dismiss, a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level . . . ." Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555 (2007).

Article III of the United States Constitution restricts the jurisdiction of the federal courts to actual cases and controversies. The case or controversy requirement has been effectuated by several doctrines, the most important of which is standing. Allen v. Wright, 468 U.S. 737, 750 (1984). To establish constitutional standing "the plaintiff must show that it has suffered an 'injury in fact' that is: concrete and particularized and actual or imminent; fairly traceable to the challenged action of the defendant; and likely to be redressed by a favorable decision." United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

Consistent with these principles, crime victims have standing to challenge allegedly discriminatory prosecutorial conduct only if those victims have a constitutional right to the nondiscriminatory prosecution of crime such that its deprivation constitutes injury in fact. Cf. Linda R.S. v. Richard

D., 410 U.S. 614, 617 (1977). To put it another way, the Parkhursts have standing to sue prosecuting authorities only if the discriminatory treatment they allege implicates the protections of the Fourteenth Amendment. While it is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim, see Linda R.S., 410 U.S. at 619 & n.5, this right has not been extended to crime victims.

In Linda R.S. the mother of an illegitimate child who was owed support payments sued on behalf of herself and all others similarly situated to enjoin the discriminatory application of a Texas statute criminalizing the failure to pay child support. 410 U.S. at 614-15. Although the text of the statute did not appear to distinguish between illegitimate and legitimate children, it had been construed by the courts of the state to apply only to parents of legitimate children. Id. at 615. Linda R.S. argued that this interpretation discriminated between legitimate and illegitimate children without a rational basis and therefore violated the equal protection clause. Id. at 616.

The Supreme Court concluded that Linda R.S. lacked standing to bring suit, explaining that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution" because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Id. at 619. The absence of this right, according to the Court, stems from the

"special status of criminal prosecutions in our system," which rejects a "direct nexus between the vindication of [victims'] interest[s] and enforcement of the State's criminal laws." Id.

The lower federal courts have maintained the distinction in standing between those prosecuted by the state and those who would urge the prosecution of others, even when the failure to prosecute was allegedly discriminatory. See United Sec. Sav. Bank, 394 F.3d at 567 ("private citizen generally lacks standing" to subject prosecutorial decisions to scrutiny); United States v. Grundhoefer, 916 F.2d 788, 791 (2d Cir. 1990) ("direct, distinct, and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced" thus private citizens cannot challenge decisions of prosecuting authority); Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988) (victims lack constitutional right under equal protection clause to compel criminal prosecution); Doe v. Mayor and City Council of Pocomoke City, 745 F. Supp. 1137, 1139 (D. Md. 1990) ("The Court is not aware of a constitutional, statutory, or common law right that a private citizen has to require a public official to investigate or prosecute a crime."). A leading legal commentator on constitutional issues agrees. See Laurence H. Tribe, American Constitutional Law 124 (2d ed. 1988) ("the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern; only if the litigant

is immediately affected as a target of enforcement can that presumption be overcome").

The Parkhursts point to several cases where crime victims were determined to have a right to challenge the allegedly discriminatory provision of police protection. See, e.g., Estate of Macias v. Ihde, 219 F.3d 1018 (9th Cir. 2000); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). In Macias, family members of a slain woman brought a § 1983 suit alleging that police officers had ignored repeated complaints of threatened violence and provided "inferior police protection" because the decedent was a member of a disfavored class of victims, thereby violating the Equal Protection Clause. 219 F.3d at 1019. The Ninth Circuit concluded, without reaching the merits, that "[t]here is a constitutional right [] to have police services administered in a nondiscriminatory manner - a right that is violated when a state actor denies such protection to disfavored persons." Id. at 1028. When faced with a similar allegation of discriminatory police protection, the district court in Thurman determined that "[p]olice action is subject to the equal protection clause and section 1983 whether in the form of commission of violative acts or omission to perform required acts pursuant to the police officer's duty to protect." 595 F. Supp. at 1527.

The Parkhursts claim to have been injured by a failure to prosecute Belt rather than by a failure to provide police protection to H.P., and they point to no cases which have recognized a right to compel prosecution of a wrongdoer. That the standing

analysis differs depending on whether the alleged injury arises from a failure to prosecute or a failure to protect is not without rationale. While police officers are under a "statutorily imposed duty to enforce the laws equally and fairly," Thurman, 595 F. Supp. at 1527 (quoting Smith v. Ross, 482 F.2d 33, 36 (6th Cir. 1973) (per curiam)), "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion," United States v. Batchelder, 442 U.S. 114, 124 (1979). The Parkhursts, alleged victims of a discriminatory prosecutorial policy, did not suffer injury in fact as defined by the Supreme Court because they were "neither prosecuted nor threatened with prosecution." Thus, they lack standing to bring this claim against Tabor, Shue, and Sebastian County.[4]

III.

For the foregoing reasons, the judgment of the district court is affirmed.[5]

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[4] We note that the Parkhursts are not without other avenues to redress their grievance. Prosecutorial decisions are "discretionary public duties that are enforced by public opinion, policy, and the ballot." Pocomoke City, 745 F. Supp. at 1139.

[5] The motion of Tabor and Shue to strike documents from the appellants' appendix and submission of exhibits is denied as moot.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2610

[Filed June 25, 2009]

Ross Parkhurst, individually and as guardian and next friend of H. P.; Amy Parkhurst, individually and as guardian and next friend of H. P.; H. P., a minor child under the age of eighteen,

Plaintiffs - Appellants,

v.

Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; Daniel Shue, individually and in his official capacity as Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; County of Sebastian, a body corporate and politic in the State of Arkansas,

Defendants - Appellees.

Chad Belt, an individual,

Defendant

Appeal from U.S. District Court
for the Western District of Arkansas - Ft. Smith
(2:07-cv-02068-RTD)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 25, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civ. No. 07-2068

[Filed June 24, 2008]

ROSS PARKHURST and AMY PARKHURST, as next friend of H.P., a minor child under the age of eighteen	)
PLAINTIFFS	)
v.	)
CHAD BELT	)
DEFENDANT	)

JUDGMENT

On the 17th day of June 2008, this matter came on for trial to a duly selected jury consisting of eight members, the Honorable Robert T. Dawson presiding. Two members of the jury were excused during the course of the trial. The trial continued until June 20, 2008, when the case was submitted to the six-member jury on interrogatories and a

unanimous verdict was reached as to each interrogatory as follows:

INTERROGATORY NO. 1: ON PLAINTIFFS' CLAIM THAT DEFENDANT COMMITTED A BATTERY AGAINST H.P., WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS __√__

DEFENDANT _____

INTERROGATORY NO. 2: ON PLAINTIFFS' CLAIM THAT DEFENDANT COMMITTED OUTRAGE AGAINST H.P., WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS __√__

DEFENDANT _____

INTERROGATORY NO. 3: STATE THE AMOUNT OF COMPENSATORY DAMAGES THAT YOU FIND FROM THE PREPONDERANCE OF THE EVIDENCE SHOULD BE AWARDED TO PLAINTIFFS.

ANSWER: $250,000

INTERROGATORY NO. 4: STATE THE AMOUNT OF PUNITIVE DAMAGES THAT YOU FIND FROM CLEAR AND CONVINCING EVIDENCE SHOULD BE AWARDED TO PLAINTIFFS.

ANSWER: $750,000

INTERROGATORY NO. 5: ON DEFENDANTS' CLAIM THAT PLATINIFFS COMMITTED DEFAMATION AGAINST DEFENDANT, WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS _√_

DEFENDANT ____

In accordance with this verdict, it is HEREBY ORDERED AND ADJUDGED that H.P. should have and recover of and from Defendant compensatory damages in the amount of $250,000.00, and punitive damages in the amount of $750,000, plus interest from the date of this judgment until paid at the current post-judgment interest rate of 2.75% per annum. Plaintiffs' counsel is directed to file any request for allowable costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure and Title 28, Section 1920 of the United States Code.

Dated this 24th day of June 2008.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civ. No. 07-2068

[Filed October 30, 2007,
as amended November 26, 2007]

ROSS PARKHURST and AMY PARKHURST, individually and as next friend of H.P., a minor child under the age of eighteen

PLAINTIFFS

v.

STEPHEN TABOR, individually and in his official capacity as Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; DANIEL SHUE, individually and in his official capacity as Chief Deputy Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; COUNTY OF SEBASTIAN, a body corporate and politic in the State of Arkansas;

CHAD BELT, an individual)
DEFENDANTS)
)

MEMORANDUM OPINION & ORDER

This case requires the Court to determine whether a crime victim can invoke federal jurisdiction to challenge as violative of her right to equal protection a state decision not to prosecute the party she accuses for reasons of class-based discriminatory prejudice against that victim. Plaintiffs in the present case, the biological mother and adoptive father of H.P., a minor child, allege prosecutors for the State of Arkansas acted with invidious prejudice against H.P. and similarly situated crime victims in declining in the face of overwhelming evidence of guilt to prosecute Chad Belt, biological father of H.P., for sexual abuse. Before the Court are motions to dismiss (Docs. 7, 17) filed pursuant to Fed. R. Civ. Pro. 12(b)(6) by separate Defendants, Sebastian County, Arkansas and named prosecutors, and responsive pleadings, which raise *inter alia* the issue of whether the decision not to prosecute Belt injured H.P. in such a personalized and direct manner that Plaintiffs have standing to bring suit under 42 U.S.C. § 1983 to test that decision against the equal protection mandate of the Fourteenth Amendment. Whereas the Court finds no constitutional right of crime victims to the nondiscriminatory prosecution of crime, and for reasons reflected herein, the Court determines Plaintiffs are without standing, and Defendants' motions are GRANTED.

I. Background

In ruling on motions under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations of plaintiffs and make all reasonable inferences in favor of plaintiffs. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). Thus, the Court recites the facts, in the light most favorable to Plaintiffs, as follows:

H.P. was born on May 8, 2000 out of the marriage of Plaintiff Amy Parkhurst and Defendant Chad Belt, who resided at that time in the State of Arkansas. Following the divorce of Parkhurst and Belt on August 23, 2000, Parkhurst maintained custody of H.P. and Belt was permitted visitation privileges during the summer months. On December 23, 2001, Parkhurst married Plaintiff Ross Parkhurst, and the new family eventually relocated from Arkansas to Vancouver, Washington.

Following H.P.'s first visit with Belt in the summer of 2001, H.P. pleaded with Parkhurst not to require her to return to Belt's home. When Belt arrived the following summer to retrieve H.P. for her visit, H.P. suffered a nervous breakdown and was not required to go with Belt. However, Belt insisted that H.P. resume visitation in 2003. During that visit, Parkhurst detected increasing agitation and emotionality in H.P. during phone conversations. H.P. attributed her distress to the fact that Belt had, in a violent rage, beaten H.P.'s pet dog to death. Parkhurst's concerns grew when, on July 21, 2003, H.P. informed Parkhurst that

H.P. had suffered injury to her genital area in a diving board accident. (Doc. 1 ¶¶ 25, 26.)

Out of concern for the true nature of H.P.'s injuries and Belt's failure to procure medical treatment for H.P., Parkhurst traveled to Arkansas. Parkhurst found H.P. to have extensive injuries but reluctant to discuss the cause. Parkhurst removed H.P. from Belt's home and immediately sought medical treatment for her in Arkansas. Medical personnel diagnosed H.P. as a victim of sexual abuse and referred the matter to the Crimes Against Children Division ("CACD") of the Arkansas State Police. CACD determined that H.P. had been sexually abused but that H.P. maintained that she had been injured on a diving board for fear of identifying the perpetrator. The Children Safety Center in Springdale, Arkansas diagnosed H.P. as a victim of sexual trauma and identified Belt as the alleged perpetrator despite H.P.'s refusal to accuse Belt.

After returning to Washington, Parkhurst was contacted by Belt and his attorney, who on their own initiative offered to terminate Belt's parental rights and allow Ross Parkhurst to adopt H.P. in exchange for a letter stating that H.P. had never accused Belt of sexual abuse. (Doc. 1 ¶¶ 34, 35.) Parkhurst agreed.

Upon learning that she would not have to return to Arkansas, H.P. informed Parkhurst that Belt had sexually abused and raped her in the summers of 2001 and 2003. (Doc. 1 ¶¶ 39, 40.) A psychiatrist confirmed the credibility of H.P.'s allegations, and

the Arkansas Crime Victims Reparations Board awarded H.P. a sum for medical expenses. Belt was arrested by Sebastian County police and charged with felony sexual assault.

Prosecuting attorney Tabor and Chief Deputy Prosecuting Attorney Daniel Shue were assigned to Belt's case. The prosecutors expressed confidence in the overwhelming evidence against Belt. (Doc. ¶ 45.) However, according to Plaintiffs' complaint, Defendant Shue expressed to third parties, and Defendant Tabor confirmed, awareness of a policy or custom of his office against prosecuting sexual abuse cases that involve incest and a preference for finding reasons not to proceed with them. (Doc. 1 ¶ 46.) After further investigation, the prosecutors filed a *nolle prosequi* and dropped the charges against Belt.[1]

On June 6, 2007, Plaintiffs filed a complaint on H.P.'s behalf[2] against Defendant Belt under state tort law alleging battery and against Defendant prosecutors and Sebastian County, Arkansas under § 1983 alleging violations of H.P.'s right to equal protection. Plaintiffs seek damages and an injunction requiring the reinstatement of the charges against Belt. Plaintiffs contend H.P. was discriminated against as a member of a class they

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1 Defendants allege their decision was based on the fact that Belt successfully passed a polygraph examination after the prosecutors stipulated to its admissibility.

2 Fed. R. Civ. Pro. 17(c) permits guardians to sue on behalf of infant children as their representatives.

define as victims of incestuous sexual abuse. Pursuant to Defendants' motions to dismiss, the Court must determine whether H.P. suffered a personal injury resulting from the decision not to prosecute Belt such that Plaintiffs have standing to bring suit under § 1983.

II. Standard of Review

When a dispositive issue of law precludes a plaintiff from being entitled to relief regardless of the set of facts, consistent with its allegations, the plaintiff might prove, Rule 12(b)(6) authorizes a court to dismiss that plaintiff's claims. *Neitzke v. Williams* 490 U.S. 319, 326-327 (1989); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). In order to streamline litigation and dispense with needless discovery and factfinding, courts are required to dismiss legal claims that are destined to fail regardless of whether they are nearly viable. *Neitzke*, 490 U.S. at 326-27 (stating "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable . . . . [A] claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (May 21, 2007). Further, those factual allegations must be contained in the four corners of the complaint to be cognizable to a court ruling on a motion to dismiss. *Florida State Bd. of Admin. v. Green Tree Financial Corp.*, 270 F.3d 645, 663 (8th Cir. 2001).

However, a court may not dismiss claims for mere disbelief of a plaintiff's allegations, *Neitzke*, 490 U.S. at 327. Courts must accept as true a plaintiff's well-pleaded allegations, draw all reasonable inferences in favor of the plaintiff and construe complaints liberally. *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988); *Hafley*, 90 F.3d at 266; *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Courts should bear in mind that "[t]he issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims." *Aceto Agr. Chemicals Corp.*, 872 F.2d at 1376.

In the case at bar, the Court finds presentation of evidence to be unnecessary. Accepting as true the allegations of Plaintiffs and making all reasonable inferences in favor of Plaintiffs, the Court finds no provable set of facts on which Plaintiffs might establish standing to maintain an action under § 1983. H.P. cannot be said to be personally injured by the decision not to prosecute Belt because the Constitution does not guarantee to H.P. the nondiscriminatory prosecution of crimes against her.

III. Discussion

Defendants challenge Plaintiffs' standing to invoke the jurisdiction of this Court under Article III of the United States Constitution, which restricts the jurisdiction of federal courts to actual cases and controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The case or controversy requirement effectuates the principle of separation

of powers on which the Federal Government is founded, *id.*, and is thus "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). In response to "concern about the proper–and properly limited–role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), the case or controversy requirement has been crystalized by several doctrines, the most important of which, raised here by Defendants, is the doctrine of standing. *See Allen*, 468 U.S. at 750. The Court must determine whether crime victims have standing to invoke the Article III adjudicatory power to subject state prosecutorial decisions to constitutional scrutiny or whether such decisions are "discretionary public duties that are enforced by public opinion, policy, and the ballot." *Doe v. Mayor and City Council of Pocomoke City*, 745 F. Supp. 1137, 1139 (D. Md. 1990). In other words, when prosecutors decline to charge perpetrators of crimes against a particular class of citizens for prejudicial disfavor of that class, can those victim-citizens make constitutional challenges or must they resort to the political process to hold prosecutors accountable? May they respond to prosecutorial selectivity personally as litigants or must they respond collectively as voters?

In order to have standing to invoke the judicial process, a plaintiff must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Valley Forge Christian Coll. v.*

Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). "Standing it is admitted does not always lend itself to consistently logical analysis. But injury in fact stands on this subject like a deeply driven channel marker for all to see while the swirl and eddy of inconsistent currents round-about it." *U.S. v. Grundhoefer*, 916 F.2d 788, 791-92 (2nd Cir. 1990). The personal injury requirement has the effect of preventing litigants from raising the rights of other individuals, barring adjudication of generalized grievances more appropriately addressed by the political process and the mechanics of representative government and requiring plaintiffs to be possessed of an interest protected by the law invoked. *See Allen*, 468 U.S. at 751. Plaintiffs must assert an interest more particularized and personal than the general interest of the public in the evenhanded administration of justice. Plaintiffs must "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and an injury in fact that is concrete, particularized, actual or imminent, fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The harm alleged by Plaintiffs cannot be conjectural or hypothetical, *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983), nor can it be merely abstract, *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); rather, it must be "distinct and palpable." *Warth*, 422 U.S. at

501. If Plaintiffs cannot make a showing sufficient to satisfy those minima, the Court is "powerless to create its own jurisdictionby embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-156 (1990). Accordingly, the Court must determine whether H.P. has a personal interest, in the form of a constitutional right to the nondiscriminatory prosecution of crime, such that she suffers direct and personal injury from the decision not to prosecute Belt.

While there are broad and expansive categories of personal interests that confer standing on a party, the requirement remains firm that a potential plaintiff must herself have suffered injury. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). "[W]e have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S.*, 410 U.S. at 617 (citing *e.g. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972); *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Baker*, 369 U.S. at 204) (footnotes omitted). Plaintiffs have standing to maintain suit if the discriminatory treatment they allege implicates the protections of the Fourteenth Amendment such that they are constitutionally and judicially cognizable. Prosecutorial conduct may only be subjected to constitutional scrutiny by crime victims if those

victims have a constitutional right to the nondiscriminatory prosecution of crime.

The Court can find no decision recognizing such a right and has found courts and scholars to be unanimous in their disavowal of its existence. Urged by a litigant to recognize "an enforceable right . . . as a victim to have [] defendants criminally prosecuted" and "that such a right was protected by the equal protection clause," the Fourth Circuit stated axiomatically that "[t]here is, of course, no such right." *Sattler v. Johnson,* 857 F 2d 224, 227 (4th Cir. 1988); *see also Sellner v. Panagoulis,* 565 F. Supp. 238, 250 (D. Md. 1982) (stating "[t]his court does not know of any right afforded by either the Constitution or laws of the United States to private persons to compel a state to prosecute criminal activity."), *cert. denied,* 479 U.S. 1069 (1987); *Doe*, 745 F. Supp. at 1139 (stating "[t]he Court is not aware of a constitutional, statutory, or common law right that a private citizen has to require a public official to investigate or prosecute a crime."); *Linda R.S.*, 410 U.S. at 619 (finding mother to be without standing to seek injunction requiring district attorney to prosecute father for failure to make child support payments because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Crime victims lack standing to challenge prosecutorial decisions due to the "special status of criminal prosecutions in our system," which prevents the establishment of a "direct nexus between the vindication of [victims'] interest[s] and

enforcement of the State's criminal laws" such that victims would be considered to have a personal stake in state punishment of crime. *Linda R.S.*, 410 U.S. at 619. That conclusion is drawn necessarily from the fundamental purposes of the criminal justice system. Criminal law operates on the public level through penalty and determent to protect the interests of the public at large, and it will not reach into the province of civil law to offer compensation to and contemplate the personal interests of individuals who suffer particularized injury. *See LaFave and Scott*, Criminal Law Handbook, 11, West Publishing (1977). "Collateral individuals to [a criminal] proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim," *Grundhoefer*, 916 F.2d at 791, because crime is not prosecuted for the benefit of the victimized; crime is prosecuted on behalf of the state in the collective interest of the public. Thus, it is generally recognized that:

> The direct, distinct and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced. It is the defendant and he alone that suffers the direct consequences of a criminal conviction and sentence. . . . For this reason a private citizen generally lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.

Id. at 791-92 (denying standing to bankruptcy trustee to appeal restitution order imposed on debtor's principals) (quotations omitted); *see also Younger v. Harris*, 401 U.S. 37, 41 (1971) (finding certain plaintiffs to lack standing to challenge a criminal statute where "[n]one ha[d] been indicted, arrested, or even threatened by the prosecutor."); *U.S. v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (finding crime victims to be without standing to challenge through appeal the criminal restitution orders of federal district courts); *Whitmore*, 495 U.S. at 157 (denying inmate standing to bring challenge to another inmate's death sentence under the Eighth Amendment). Regardless of whether a constitutional challenge is brought by a crime victim or another party collateral to a criminal prosecution, the rule abides that "the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern." L. Tribe, *American Constitutional Law* § 3-16, at 124 (2d ed. 1988).

The Court is well advised of those decisions that warn:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the

> denial of equal justice is still within the prohibition of the constitution.

U.S. v. Handler, 383 F. Supp. 1267, 1270-71 (D. Md. 1974). However, the case or controversy requirement of Article III extends to criminal defendants and those threatened with prosecution unique judicial standing to make selective enforcement challenges under the Equal Protection Clause. *See e.g. Stemler v. City of Florence*, 126 F.3d 856, 872-73 (6th Cir. 1997). While it is said that the standing requirement "does not insulate executive action from judicial review . . . [or] prevent any public interests from being protected through the judicial process," *Sierra Club*, 405 U.S. at 740, the current state of the law does not permit crime victims to vindicate whatever interests they may have in the prosecution of crime through the judicial process. Undoubtably, victims of crime would be gratified to see perpetrators punished, however, that interest is not protected by the Equal Protection Clause. The Court recognizes the paradigm that, while only the prosecuted have standing to challenge a prosecutorial regime that favors victimizers of certain disfavored victims, claims such as Plaintiffs' arise only in the absence of prosecution. The true parties in interest stand to benefit from the discriminatory conduct and thus will be disinclined to make constitutional challenges. However, whereas Plaintiffs are unable to show that H.P. sustained some direct and actual injury, more particularized than one to her general interest in seeing equality and fairness in enforcement of the laws, the Court must find Plaintiffs have failed to raise a justiciable case or

controversy. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Ex parte Levitt*, 302 U.S. 633, 634 (1937). Any ruling to the contrary would violate the fundamental principles of federalism and separation of powers that define and limit the power of this Court.

IV. Conclusion

Based on the foregoing, Defendants' motions to dismiss are GRANTED as to Plaintiff's constitutional claims and those claims are DISMISSED WITH PREJUDICE. Whereas the Court disposes of Plaintiffs' claims on the basis of lack of standing, it intimates no view as to the merits of those claims. Whereas Plaintiffs' state claims against Defendant Belt are properly brought based on 28 U.S.C. § 1332, those claims remain pending in this Court.

IT IS SO ORDERED this 30th day of October 2007.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civ. No. 07-2068

[Filed October 30, 2007]

ROSS PARKHURST and AMY PARKHURST, individually and as next friend of H.P., a minor child under the age of eighteen	)
PLAINTIFFS	)
v.	)
STEPHEN TABOR, individually and in his official capacity as Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; DANIEL SHUE, individually and in his official capacity as Chief Deputy Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; COUNTY OF SEBASTIAN, a body corporate and politic in the State of Arkansas; CHAD BELT, an individual	)
DEFENDANTS	)

JUDGMENT

For reasons set forth in the Memorandum Opinion, filed contemporaneously herewith,

Defendants' motions to dismiss (Docs. 7, 17) are **GRANTED**.

IT IS SO ORDERED this 30th day of October 2007.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

AO72A (Rev. 8/82)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-2610

[Filed August 6, 2009]

Ross Parkhurst, individually and as guardian and next friend of H. P., et al.,	)
Appellants	)
v.	)
Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas, et al.,	)
Appellees	)
Chad Belt, an individual,	)

Appeal from U.S. District Court
for the Western District of Arkansas - Ft. Smith
(2:07-cv-02068-RTD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

August 06, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.